United States Court of Appeals

for the Second Circuit

PETITIONER'S BRIEF

75-4021

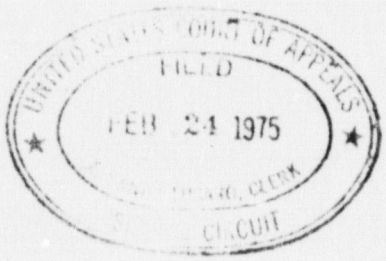
IN THE

United States Court of Appeals

FOR THE SECOND CIRCUIT

NATIONAL ASSOCIATION OF INDEPENDENT TELEVISION PRODUCERS AND DISTRIBUTORS	)	
WARNER BROTHERS, INC., COLUMBIA PICTURES INDUSTRIES, INC., MGM TELEVISION, UNITED ARTISTS CORPORATION, MCA, INC. and TWENTIETH CENTURY-FOX TELEVISION	)	Nos: 75-4021 75-4024 75-4025 75-4026
SANDY FRANK PROGRAM SALES, INC.	)	
WESTINGHOUSE BROADCASTING COMPANY, INC.	)	
CBS, INC., *Petitioners,*	)	
v.	)	
FEDERAL COMMUNICATIONS COMMISSION and THE UNITED STATES OF AMERICA, *Respondents,*	)	
AMERICAN BROADCASTING COMPANIES, INC. *et al.* *Intervenors.*	)	

BRIEF FOR PETITIONER WESTINGHOUSE BROADCASTING COMPANY, INC.



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STATEMENT OF ISSUES PRESENTED FOR REVIEW

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2. Whether the definitions of exempted program material are impermissibly vague in violation of the First Amendment.

IN THE
UNITED STATES COURT OF APPEALS
FOR THE SECOND CIRCUIT

WESTINGHOUSE BROADCASTING COMPANY, INC.,	)	
Petitioner,	)	
v.	)	Case No. 75-4026
FEDERAL COMMUNICATIONS COMMISSION AND THE UNITED STATES OF AMERICA,	)	
Respondents,	)	
AMERICAN BROADCASTING COMPANIES, INC.	)	
Intervenor.	)	

On A Petition to Review an Order of
the Federal Communications Commission

BRIEF FOR PETITIONER
WESTINGHOUSE BROADCASTING COMPANY, INC.

Statement of the Case

This proceeding involves a petition to review an order of the Federal Communications Commission (hereinafter "Commission") amending Section 73.658(k) (47 C.F.R. §73.658(k)) of the Commission's Rules and Regulations, known as the "Prime Time Access Rule." The amendments to the prime time access rule were adopted by the Commission in its Second Report and Order in Docket No. 19622, FCC 75-67, released January 17, 1975. (J.A. 84) (hereinafter cited "Second Report and Order, ¶ ").

Effective September 8, 1975, the amended rule supersedes former Section 73.658(k), adopted by the Commission in its Report and Order in Docket No. 12782, Network Television Broadcasting, 23 FCC 2d 382 (1970), as modified on reconsideration, Network Television Broadcasting, 25 FCC 2d 318 (1970). The Commission's powers under the Communications Act and the Constitution to adopt the prime time access rule and related rules were affirmed by this Court in Mt. Mansfield Television, Inc. v. F.C.C., 442 F. 2d 470 (2d Cir. 1971).

As enacted in 1970, Section 73.658(k) provided that television licensees operating in the 50 largest television markets, in which there are three or more commercial television stations, shall not broadcast more than three hours of network programming during the prime time hours of 7:00-11:00 p.m. (local time) each evening. */ The rule further provided that, after October 1, 1972, programs previously exhibited by a network (off-network programs) and feature films broadcast within the previous two years by a station in a market could not be broadcast during the excluded prime time hour.

The rule as now revised is appended hereto as Appendix A.

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*/ Except in the Central Time Zone where the relevant period is 6:00 to 10:00 p.m. Certain network-offered programs were excluded from the definition of "network programs" - special news programs dealing with fast-breaking news events, on-the-spot coverage of news events, and political broadcasts by legally qualified candidates for public office.

Westinghouse Broadcasting Company, Inc. */ seeks review only of that portion of the Commission's order promulgating revised Section 73.658(k)(1) which exempts from the operation of the rule, without limitation, network or off-network (network re-runs) programs designed for children, public affairs programs and documentary programs.

By prior order in Docket No. 19622, 44 FCC 2d 1081, reconsideration denied, 46 FCC 2d 1013 (1974), the Commission sought to amend Section 73.658(k) to substitute the "Evening Programming Requirements" rule. On review, this Court reversed in part and enjoined the Commission from making its action effective before September of 1975. National Association of Independent Television Producers and Distributors v. F.C.C., 502 F. 2d 249 (2d Cir. 1974). The petitions for review, including one brought by Group W **/, were otherwise dismissed "without prejudice to their being brought anew after the Commission has had the opportunity to conduct such further proceedings as it deems appropriate." Id. at 258.

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*/ Westinghouse Broadcasting Company, Inc. (hereinafter "Group W") is licensed to operate television stations in Baltimore, Boston, Philadelphia, Pittsburgh, and San Francisco. The Boston and Philadelphia stations are affiliated with NBC; the Pittsburgh and San Francisco stations are affiliated with CBS; and the Baltimore station is an ABC affiliate.

**/ Westinghouse Broadcasting Company, Inc. v. F.C.C. (Case No. 74-1283).

A. Events Leading to the Adoption of the Access Rule in 1970 */

The prime time access rule had its genesis in two proceedings instituted by the Commission in the late 1950's. On February 26, 1959, the Commission initiated investigatory proceedings in Docket No. 12782 to "...determine the policies and practices pursued by the networks and others in the acquisition, ownership, production, distribution, selection, sale and licensing of programs for television exhibition, and the reasons and necessity in the public interest for said policies and practices ..." The Commission focused on the extent to which networks or others had achieved control of programming and the extent to which network ownership and control was desirable or necessary. Following extensive public hearings conducted in New York, Washington and Los Angeles, the Commission in June of 1960 received an Interim Report from its Office of Network Study concerning the licensee-affiliate relationship and the inability of licensees properly to exercise programming responsibility. **/ A second Interim Report (Part I) dealing with network program procurement practices was submitted on November 28, 1962, and

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*/ This history is also summarized in Mt. Mansfield Television, Inc. v. F.C.C., supra, 442 F. 2d at 473-76. See also, Second Report and Order, ¶¶3-9 (J.A. 86-89).

**/ Interim Report, Responsibility for Broadcast Matter, June 15, 1960, reprinted in H.R. Rep. No. 281, 88th Cong., 1st Sess. 197-494 (1963). This report served as the basis of the Commission's Report and Statement of Policy Re: Commission En Banc Programming Inquiry, FCC 60-970, 20 Pike & Fischer R.R. 1901 (1960).

this was later supplemented by Part II. */

On March 22, 1965, the Commission issued a Notice of Proposed Rule Making in Docket No. 12782. As a result of its investigative inquiry, the Commission tentatively found and undue concentration of control over television programming by the three networks. In addition to the rules which were proposed, the Commission invited alternative proposals which would alleviate the problems of undue concentration and restraint on licensee responsibility for programming.

Virtually concurrent with the commencement of this investigatory proceeding, on April 22, 1959, the Commission initiated rule-making proceedings in Docket No. 12859 to deal with the problems raised by television network "option time." This was the practice by which the networks required stations to broadcast all sponsored programs offered during specified hours. The Commission believed this practice significantly restrained the ability of licensees to exercise their program selection responsibilities. In May 1963, the Commission prohibited the "option time" practice for this reason, also concluding that it was anti-competitive and unreasonably restrictive of non-network program suppliers' access to station time, including the bulk of prime time.

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*/ Second Interim Report, Television Network Program Procurement (Part I), November 28, 1962, reprinted in H.R. Rep. No. 281, 88th Cong., 1st Sess. 13-195(1963); and Second Interim Report, Television Network Program Procurement (Part II), July 2, 1965.

The Commission expected that its action would foster licensee programming responsibilities and that an "...improvement of competitive conditions and the position of 'fenced out'..." non-network programming sources would result from its action. */

In the option time proceeding, Group W proposed the adoption of a rule substantially similar to the access rule. Group W took the position that the mere elimination of option time would not cure the problems emanating from network domination. The Commission, however, concluded that in light of its action prohibiting option time it should await developments in the industry, operating without option time, before considering the implementation of Group W's proposal. The Commission explained:

> "We do not say that the public interest would never be served by action along some of the lines just mentioned; if it so appears of course such action will be considered. But for the present, with the major step taken herein, it would be premature to consider further measures until we have the benefit of observation of future developments." **/

Approximately three years later in Docket No. 12782, Group W, recognizing that the Commission's objectives in prohibiting option time had not been realized, resubmitted its earlier proposal. Group W urged that it had become even more necessary to provide individual stations with meaningful programming alternatives--that licensees should be able to exercise more that a nominal choice in programming to serve local needs.

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*/ Second Report and Order re Television Option Time, 34 FCC 1103, 1128, 25 Pike & Fischer R.R. 1651, 1680 (1963).

**/ Id. at 1131, 25 Pike & Fischer R.R. at 1683.

On September 20, 1968, the Commission issued an Order which set the matter for oral argument and invited further comment on the Group W counter-proposal. Oral argument was held before the Commission en banc on July 22-23, 1969.

On May 7, 1970, the Commission released a Report and Order adopting the prime time rule. Network Television Broadcasting, 23 FCC 2d 382, as modified on reconsideration, 25 FCC 2d 318 (1970). Also adopted at the same time as part of a comprehensive regulatory plan to deal with the problem of network dominance were rules prohibiting networks from engaging in program syndication and from acquiring financial interests in programs supplied to networks for exhibition. */

After review of the exhaustive record compiled in Docket No. 12782, the Commission concluded that the elimination of option time in Docket No. 12859 had not served to encourage individual licensee programming responsibility and "multiply competitive programming sources." Network Television Broadcasting, supra, 23 FCC 2d at 396. Consistent with its "continuing program" to encourage such responsibility, the Commission found adoption of the access rule was appropriate and in the public interest. The Commission found that in the prime time evening hours, when the vast preponderance of viewers watch television, control over programming, and of access by program suppliers to individual stations, is heavily

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*/ Section 73.658(j) of the Commission's Rules (47 C.F.R. §73.658(j)). These regulations are popularly called the "network syndication" and "financial interest" rules.

concentrated in the three networks. Network Television Broadcasting, supra, 23 FCC 2d at 385-86.

It was concluded that this excessive level of concentration seriously unbalanced the market to the disadvantage of independent, non-network programming sources and effectively precluded the development of alternative prime-time programming. First-run, independently produced and syndicated programming had virtually disappeared. Network Television Broadcasting, supra, 23 FCC 2d at 385-87. Thus, it was the Commission's ultimate desire "to provide opportunity--now lacking in television--for the competitive development of alternative sources of television programs so that television licensees can exercise something more than a nominal choice in selecting programs ...." */ As stated above, the rule was deliberately limited to network affiliated stations in the 50 largest markets and left the networks completely free to offer any programming they desired in the hope that they would continue to offer a full evening schedule to all markets. **/

B. The Initial Proceedings in Docket No. 19622.

On October 30, 1972, the Commission initiated the proceedings in Docket No. 19622 by Notice of Inquiry and

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*/ Network Television Broadcasting, supra, 23 FCC 2d at 397.

**/ Unfortunately this hope was not realized as the networks did cut back their schedules to three hours per evening. Although not required by the rule, the present practice of each of the three networks is to offer only three hours of programming each evening. In the current season, network program service regularly is offered by all three networks in the 8-11 p.m. period (7:30-10:30 p.m. Sundays).

Notice of Proposed Rule Making. 37 FCC 2d 900 (1972)(J.A. 1). Information was sought as to the effect and operation of the access rule and comments were invited "...on changes in that regulation which may be appropriate for the future." (J.A. 1).

Section II-A of the Notice requested various information concerning the effect and impact of the rule's operation. Section II-B outlined specific rule-making proposals on which comments were invited, including possible repeal of the rule. Concerning this latter question, the Commission cautioned that it had not reached any tentative conclusions in this respect:

> "Indeed, we stress that the presumption is the other way: the Commission has a rule which is now going into full effect and there is thus a clear and considerable burden upon the opponents to demonstrate that, in actual operation, the rule will not serve the public interest...." (J.A. 9).

Section II-C of the Notice dealt with the Inquiry phase of the proceeding. The topics enumerated in this section included the possibility of encouraging the broadcast of certain types of network or off-network program material through exemption from the rule's provisions. (J.A. 29). With respect to these topics, it was stressed that the proceeding was "...an Inquiry only with changes along these lines to be adopted, if at all, only after further rule-making proceedings..." (J.A. 27).

In January of 1973, extensive comments were submitted in response to the Commission's Notice. In its comments, Group W reaffirmed its support of the fundamental concept embodied in the access rule. */ On July 30-31, 1973, oral argument was held before the Commission en banc. Thereafter, the Commission released a Public Notice on November 29, 1973, announcing that it had instructed its staff to prepare a decision in the proceeding. The Public Notice outlined in general the terms of the revised rule but gave no indication of the effective date of the changes.

On February 6, 1974, the Commission (Chairman Burch, and Commissioners Lee, Reid, Wiley and Hooks) released its Report and Order in the proceeding. Prime Time Access Rule, 44 FCC 2d 1081 (1974). While the Commission found the relatively short period the access rule had been in effect did not provide a fair test of its potential, **/ it nonetheless concluded that revisions would be appropriate. These revisions were characterized as "basically not great." ***/

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*/ Group W stated that "[b]y placing a modest limitation on the amount of network programming which may be broadcast by stations each evening during the viewing hours when most people watch television, the rule insures that local stations will function as more than a conduit for the programs of one of the three national networks. In Group W's opinion, it is a reasonable regulatory solution to the critical problem of network domination of prime time which was documented in Docket 12782. The rule or one like it is essential if individual licensees are to occupy a meaningful role in our nation's television broadcast system." Group W comments, filed January 15, 1973, page 3.

**/ 44 FCC 2d at 1137-38.

***/ 44 FCC 2d at 1147.

Because of the inadequate trial period, the Commission found that it "...need not look too closely at the programming record under the rule so far." 44 FCC 2d at 1138. The same reason was cited for rendering study of the impact of the rule on the stimulation of independent program production unnecessary. "[W]e need not at this point get into this question." 44 FCC 2d at 1139.

First, the Commission changed the name of the rule to the "Evening Programming Requirements" rule. 44 FCC 2d at 1149. Then, concluding that "some increase in network programming should be permitted " (44 FCC 2d at 1132), the Commission opted not to continue the three-hour limitation on the carriage of network programming in the 7:00-11:00 p.m. prime time period by affiliates subject to the rule. In its place, the revised rule, with certain exceptions, would have barred network affiliates from carrying network programming in the 7:30-8:00 p.m. periods Monday through Saturday. The Commission described its action as removing all restrictions on the 7-7:30 p.m. period as well as 7:30-8:00 p.m. Sunday evening period. 44 FCC 2d at 1132. In its view, this apportionment of the 7-8 p.m. hour, the crux of its decision, simply represented "...an adjustment of competing demands for access or exclusive access..." 44 FCC 2d at 1133.

Assertedly to facilitate the broadcast of network or off-network "children's specials" before 8 p.m. and to make the broadcast of network or off-network "public affairs" and "documentary" programs easier, the Commission also provided that stations could use one of the six specified "access" periods for such material. 44 FCC 2d at 1134-35. The term "documentary programming" was defined to mean "...any program which is non-fictional and educational or informational, but not including programs where the information is used in a contest among participants." 44 FCC 2d at 1149. The Commission set September 1, 1974, as the effective date of the revised rule, citing what it asserted was the minor nature of the revisions. 44 FCC 2d at 1145-47.

C. Appellate Review by This Court

On review, this Court reversed in part and enjoined the Commission from making the revised rule effective before September 1975, finding that the effective date specified by the Commission was unreasonable in view of the great impact of the changes. National Association of Independent Television Producers and Distributors v. F.C.C., 502 F. 2d 249 (2d Cir. 1974). The matter was remanded "... to permit the Commission to specify precisely what the effective date should be." 502 F.2d at 255. In view of this disposition, the Court further decided:

> "...to postpone consideration of the merits of the petitions before us. The Commission may choose to utilize the additional time available to it to reconsider its changes in the rule. Further experience with the original rule may aid its deliberations and our own. We therefore dismiss the petitions without prejudice to their being renewed after the Commission has had an opportunity to conduct any further proceedings it deems desirable." Id.

To assist the Commission in any further proceedings that it deems appropriate, the Court drew attention to "certain policy issues raised by the petitions" on which a greater elaboration might be helpful. 502 F.2d at 255-58. Noting the broad impact of the access rule on the public, the Court further suggested that the Commission might have done more to obtain the views of various public groups affected by the rule and those of the Department of Justice concerning the rule's competitive impact. This latter suggestion was prompted by a concern that the Commission may have sought only to reach an impermissible compromise between the competing interests of private parties rather than consider "the more fundamental public interest." 502 F.2d at 258.

D. Further Proceedings in Docket 19622

In response to this Court's suggestion, the Commission initiated further proceedings by order dated July 17, 1974. (J.A. 50). Extensive comments were received from a wide range of public groups including, for example,

the National Black Media Coalition, the Consumer's Union, and the National Organization of Women. The public groups were virtually unanimous in their support of the rule. */ The Department of Justice voiced similar support. **/

On November 15, 1974, the Commission announced that it had instructed its staff to prepare a decision adopting new provisions for the prime time access rule. (J.A. 82.) In the Order under appeal herein, adopted January 16, 1975, the Commission decided to return to the form of the original rule but with the addition of a number of exemptions for specified types of network or off-network programs. Reversing its prior decision to adopt the Evening Programming Requirements Rule, it reaffirmed and restated the basic objectives of the access rule and found that it was working:

> "...it is important to bear in mind the rule's primary objectives: to lessen network dominance and free a portion of valuable prime time in which licensees of individual stations present programs in light of their own judgments as to what would be most responsive to the needs, interests and tastes of their communities. At the same time, the rule seeks to encourage alternative sources of programs not passing through the three-network funnel so that

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*/ Of the 21 comments and reply comments filed by public groups, all but one supported the original access rule and opposed the Evening Programming Requirements Rule. (J.A. 89-90).

**/ The Department of Justice recommended that the Commission "restore the original prime time access rule as initially formulated and that it accompany this action with an announcement that it intends to let the rule remain in effect for a suitable period, perhaps five years" in view of the consideration that it "was never given an opportunity to work." Letter to Honorable Richard E. Wiley, Chairman, Federal Communications Commission, from Thomas E. Kauper, Assistant Attorney General, dated September 20, 1974. (J.A. 79-81).

> licensees would have more than a nominal choice of material. These are still valid objectives. It was also noted that this increased supply would be a concomitant benefit to independent stations; and 'it may also be hoped that diversity of program ideas may be encouraged by removing the network funnel for this half-hour...'. Thus, diversity of programming was a hope, rather than one of the primary objectives. It was emphasized that the Commission's intention is not to smooth the path for existing syndicators or encourage the production of any particular type of program; the 'types and cost levels of programs which will develop must be the result of competition which will develop.'
>
> "As to the matter of network dominance, it is readily apparent that, as far as network control over station time is concerned, it is reduced by the requirement of cleared or access time, and that certain public advantages have resulted."
> Second Report and Order, ¶14-15, (J.A. 92)(Emphasis added).

Repeal of the rule, advocated by some parties, was found not to be in the public interest. The Commission dismissed the contentions of the rule's opponents based on an alleged lack of diversity and quality in access period programming, finding that it would be "...premature to make any final judgment at this time as to the character of this programming (assuming that such a judgment is ever appropriate)." Second Report and Order, ¶16 (J.A. 93). Other contentions relating to an alleged increase in network dominance and an adverse economic effect on the Hollywood program production industry were similarly rejected. The Commission found that network dominance has been decreased by the rule and that the alleged impact on Hollywood "...is not a relevant factor..." Second Report and Order, ¶¶23-25 (J.A. 97-98).

While retaining the form of the original rule, the Commission acted to exempt network and off-network children's, public affairs, and documentary programs from the rule's operation without limitation. A children's program is defined to mean "programs primarily designed for children age 2 through 12." A documentary program is defined as follows:

> "...programs which are non-fictional and educational or informational, but not including programs where the information is used as part of a contest among participants in the program, and not including programs relating to the visual entertainment arts (stage, motion pictures, or television) where more than 50% of the program is devoted to the presentation of entertainment material itself." (J.A. 117).

No definition of the term public affairs program is provided in the Second Report and Order. */

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*/ Other programs excluded from the operation of the rule include special news programs dealing with fast-breaking news events; on-the-spot coverage of news events (including related material); political broadcasts by or on behalf of legally qualified candidates for public office; regular half-hour network news programs when immediately adjacent to a full hour of locally produced news or public affairs programming; runovers of live-network coverage of sporting events; broadcasts of international sporting events and New Year's Day college football games and other network programming of a special nature (except other sports or motion pictures) when the network devotes all of its evening programming time to the same programming; and special provisions with respect to stations operating in the Mountain and Pacific Time Zones. Some of these exceptions were included in, or contemplated by, the original rule as affirmed by this Court. Others, while new, are largely technical in nature to remedy program scheduling problems. These exceptions are not the subject of our appeal herein.

These exceptions were included because the Commission believed that in operation the access rule "...has had the effect of inhibiting certain kinds of programming which we believe are entitled to special treatment so as to encourage their timely presentation in prime time." Second Report and Order, ¶29 (J.A.99). "The importance of these kinds of programs..." was found to outweigh "...any concern as to its source, whether locally produced, first-run syndicated, network or off-network..." Id.

Citing its recently adopted Policy Statement on television programming for children,*/ the Commission concluded that an exemption for television programming for children was necessary to the presentation of such material before 8 p.m. Second Report and Order, ¶30 (J.A.100). A similar exception for public affairs programming, described as a "codification and extension of the existing waiver for one-time network news and public affairs programs which has been in effect throughout the rule's history," was found necessary in view of the inhibiting effect the rule has had on the "networks' exercise of this highly important part of their activities..." Second Report and Order, ¶32 (J.A.101). And documentary programs were exempted in view of their "obvious informational value," which was found to outweigh the objectives of the access rule: "...here, as with public affairs and programs

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*/ Children's Television Report and Policy Statement, 31 Pike & Fischer R.R. 2d 1228 (1974).

designed for children, the public interest is on the side of the programs, and not their place of origin." Second Report and Order, ¶33 (J.A. 102).

In contrast to a similar exemption contained in the Evening Programming Requirements Rule, the exemption is not limited to a one-half hour period per week but is without limitation. */ However, in an attempt to ward off undue incursion into the time periods made available by the rule, the Commission instructed its licensees:

> "To keep such programming to the minimum consistent with their programming judgements as to what will best serve the interests of the public generally. 29/

29/ Thus, the stripping of off-network material on the theory that it is a program designed for children or a documentary program, would not be regarded as consistent with the spirit or objectives of the rule." Second Report and Order, ¶34 (J.A. 103) (Stripping is the practice of broadcasting different episodes of the same program at the same time each day throughout the week.)

The amended rule was made effective as of September 8, 1975.

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*/ Furthermore, the exemption now applies to all programming for children and is not limited to special children's programs alone. Second Report and Order, ¶28 (J.A. 99).

ARGUMENT

The crux of our appeal is a relatively narrow question. May the Commission, consistent with the First Amendment and the prohibition against censorship found in the Communications Act, exempt licensees from the access rule's three-hour limitation on networking on condition that programs whose content is acceptable to the Commission are broadcast. The access rule itself is not at issue. Litigation as to its lawfulness ended over three years ago with this Court's opinion in Mt. Mansfield.

Nor is our appeal herein directed against the particular types of programs which the Commission has sought to exempt. Indeed, these types of programs are essential features of a broadcast licensee's service to its audience. Group W has, and will continue to, broadcast such programs regardless of the ultimate outcome of this appeal.

Rather, our concern here is twofold: first with the fundamental Constitutional and statutory questions raised by the Commission's unprecedented action; */ and second with the adverse and substantial effect of this action on an important regulatory program validated by this Court.

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*/ Our concern for the Constitutional and statutory abridgement here parallels Professor Kalven's observation that "...freedom has in no small part depended on an awareness of the difference between doing something as a matter of grace and doing it as a matter of obligation." Kalven, Broadcasting Public Policy and the First Amendment, 10 J. Law and Econ. 15, 23 (1967). If a well-intentioned Commission has the power to single out programs for special treatment based on content or intrinsic merit, so would a less well-intentioned agency be able to advance its unusual tastes.

I. The Exemption for Children's, Public Affairs and Documentary Programs Violates the First Amendment.

In Mt. Mansfield Television, Inc. v. F.C.C., 442 F.2d 470 (2d Cir. 1971), this Court found that the "... prime time access rule, far from violating the First Amendment, appears to be a reasonable step toward fulfillment of its fundamental precepts..." Id. at 477. The Court carefully analyzed the Commission's objectives in terms of basic First Amendment values and found the Commission's challenged regulatory program furthered those values:

> "Thus, while the rule may well impose a very real restraint on licensees in that they will not be able to choose, for the specified time period, the programs which they may wish, as a practical matter the rule is designed to open up the media to those whom the First Amendment primarily protects - the general public.
> ....
> "The Commission does not dictate to the networks or the licensees, or the independent producers whom it hopes to stimulate, what they may broadcast or what they may not broadcast; it is merely ordering licensees to give others the opportunity to broadcast." Id. at 478, 480 (emphasis in original text).

The exemptions now under review are the direct antithesis of Mt. Mansfield. Rather than expanding, the Commission has contracted the opportunities for others to speak because it is dissatisfied with what is being said:

> "Such new persons or sources have come forward, but by and large, as far as syndicated programming is concerned, they present mostly game shows. At the same time other sorts of programming important to the public - those included in the exemptions herein - have been somewhat reduced in amount, or, in the case of children's programming, have not been available at the most appropriate time." (Second Report and Order, ¶46, J.A. 108.)

Valuable and scarce broadcast time is being returned to those very entities, whose activities were previously found to have restricted the opportunities for others to broadcast, on the sole condition that the types of programs favored by an official government agency be broadcast.

The Commission's action presents the Court with a prima facie violation of the First Amendment. Placing conditions on a broadcaster's programming freedom can be justified only if their clear purpose and effect is the achievement of First Amendment objectives. The condition here does not even purport to further such goals. Rather, it is a manifest expression of Commission program preferences which necessarily falls short when measured against the competing interests and values of the First Amendment.

For the first time in its history, the Commission has sought to specify particular types of programming, the content of which is sufficiently worthwhile in the agency's opinion to merit special consideration. Section 73.658(k)(1) of the modified rule provides, in effect, that a licensee

may choose to carry network or off-network programming in prime time without any limitation so long as a specified portion of that programming consists of children's, documentary or public affairs programs. The section thus operates to remove a requirement designed to further First Amendment objectives so long as the content of the programs aired in excess of the 3 hour limitation meets with official approval.

But the purpose of the First Amendment is to promote "'the widest possible dissemination of information from diverse and antagonistic sources...'"; */ not encourage what the government thinks the people should hear. Broadcasting and television clearly fall within the aegis of its protection. **/ Moreover, the law does not distinguish between types of programs. The "give-away" show is as entitled "'to the protection of free speech as the best literature' or music". American Broadcasting Co. v. United States, 110 F. Supp. 374, 389 (S.D.N.Y. 1953) (three-judge court) affirmed, 347 U.S. 284 (1954), citing Winters v. New York, 333 U.S. 507 (1948). ***/

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*/ Mt. Mansfield Television, Inc. v. F.C.C., supra, 442 F. 2d at 477, citing Associated Press v. U.S. , 326 U.S. 1, 20 (1945).

**/ United States v. Paramount Pictures, Inc., 334 U.S. 131, 166 (1948).

***/ Cf. Joseph Burstyn, Inc. v. Wilson, 343 U.S. 495 (1952) where the Court repudiated the view that movies were purely entertainment and beyond the reach of the free speech protection.

We recognize that the right of the broadcaster to exercise freedom of program choice is not absolute and Commission regulations can fetter that freedom to a limited degree. National Broadcasting Co. v. United States, 319 U.S. 190 (1943). This limited Governmental interference is in essence a balancing of the respective First Amendment rights of the public against those of the broadcaster and has been tolerated to insure that the ultimate First Amendment objective -- free access of all the people to ideas from diverse sources -- is preserved:

> "...the people as a whole retain their interest in free speech by radio and their collective right to have the medium function consistently with the ends and purposes of the First Amendment. It is the right of the viewers and listeners, not the right of the broadcasters, which is paramount. * * * It is the right of the public to receive suitable access to social, political, esthetic, moral, and other ideas and experiences which is crucial here." Red Lion Broadcasting Co., Inc. v. F.C.C., 395 U.S. 367, 390 (1967).

The Government's power to specify material which the public interest requires or forbids to be broadcast "carries the seeds of the general authority to censor denied by the Communications Act and the First Amendment alike". */ It is this threat to liberty, inherent whenever the Government dictates what may be seen or heard, which has required that such restraints be tolerated only if the paramount public

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*/ Banzhaf v. F.C.C., 405 F. 2d 1082, 1095 (D.C. Cir. 1968) cert. denied sub. nom., Tobacco Institute v. F.C.C., 396 U.S. 842 (1969).

right to the marketplace of ideas from diverse sources is thereby enhanced. Otherwise, the risk of enlargement of Government control over the content of broadcasting is manifest.

Basic Commission policies and regulations such as the access rule, the fairness doctrine, the chain broadcasting and multiple ownership rules (47 CFR §§73.131, 73.240 and 73.636) have been sustained on First Amendment grounds only because they "expand the diversity of expression on radio and television." */ Quite to the contrary, the action challenged here contracts or restricts that opportunity.

The Commission has acted to encourage its licensees to carry certain types of programs, not in the name of First Amendment goals, but because of what it saw as their "worthwhile" nature. Thirty years ago Judge Learned Hand, in upholding the validity of the Commission's "chain broadcasting" regulations, **/ suggested the inadequacy of such a speculative ground as a basis for denial of First Amendment rights:

> "The Commission does therefore coerce their choice and their freedom; and perhaps, if the public interest in whose name this was done were other than the interest in free speech itself, we should have a problem under the First Amendment; we might have to say whether the interest protected, however vital, could stand

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*/ CBS, Inc. v. Democratic National Committee, 412 U.S. 94, _____, 93 S.Ct. 2080, 2091, fn. 10(1973).

**/ National Broadcasting Company v. United States, 47 F. Supp. 940 (S.D.N.Y. 1942), aff'd., 319 U.S. 190 (1943).

> against the constitutional right. But that is not the case. The interests which the regulations seeks to protect are the very interests which the First Amendment itself protects..." 47 F. Supp. at 946.

The fact that some restraints, wholly unacceptable in other forms of communication, are tolerated in broadcasting is a function of the scarcity of frequencies. Indeed, this unique characteristic underlies all regulation of broadcasting. */ The Commission is charged by Congress with insuring that broadcasters operate "in the public interest". But a generalized public interest finding, while perhaps sufficient to support the great majority of regulatory actions, cannot alone justify a restriction on a licensee's First Amendment rights. Congress did "not license the Commission to scan the airwaves for offensive material with no more disciminating a lens than the 'public interest'".**/

The challenged exemptions plunge the Commission into a new and dangerous area of programming choices which it has heretofore eschewed. In its landmark Report and Statement of Policy Re: Commission En Banc Programming Inquiry, 25 Fed. Reg. 7291 (1960), 20 P & F Radio Reg. 1901, the Commission reviewed the extent of its authority in the programming area in detail. Noting that it must determine broadcasters' total programming to be responsive to the public interest,

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*/ See Robinson, Observations on 40 Years of Radio and Television Regulation, 42 Minn. L. Rev. 67 (1967).

**/ Banzhaf v. F.C.C., supra, 405 F. 2d at 1099.

the Commission nevertheless affirmed that to act "upon its own subjective determination of what is or is not a good program...would 'lay a forbidden burden upon the exercise of liberty protected by the Constitution.'" Commission En Banc Programming Inquiry, 20 P & F Radio Reg. at 1907 (1960) citing Cantwell v. Connecticut, 310 U.S. 296, 307 (1940). */

Rather than furthering the First Amendment objectives outlined in Mt. Mansfield which prompted and justified adoption of the prime time access rule, the challenged modifications represent a shrinking of the rule -- a movement away from diversity of sources and toward more network programs. The fact that program types are found "worthwhile" and thus exempt by the Commission affords no justification. Favoring one program type at a specific hour obviously forecloses another. But the Government cannot supplant programs in this manner. No matter how desirable network informational, documentary or children's programs are, the Commission cannot command that they be favored over other types of programs during a particular portion of the broadcast day:

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*/ The pitfalls of Commission programming judgments were highlighted by Commissioner Loevinger in his dissenting opinion in In re Lee Roy McCourry, 2 P & F Radio Reg. 2d 895, 907 (1964) where he observed: "...if the principle is established that the Commission has the right or power to prescribe, either directly or indirectly, the kind and quality of programs that must be carried by broadcast licensees, then the vital interest of society, the nation, and perhaps the world, in the fullest freedom of communications and expressions of ideas, in whatever form, may be compromised."

> "The line between the informing and the entertaining is too elusive for the protection of that basic right [a free press]. Everyone is familiar with instances of propaganda through fiction. What is one man's amusement, teaches another's doctrine. */

Whenever the Commission seeks to act in this constitutionally sensitive area, it bears a heavy burden to justify its action. Cf. Organization for a Better Austin v. Keefe, 402 U.S. 415 (1971). Plainly, such justification has not been demonstrated here. The Commission purports to find that the exemptions are necessary because the access rule has had an inhibiting effect on the presentation of the material now exempted in prime time. (Second Report and Order, ¶¶29, 32, 33, and 46).

Not only is this conclusion speculative and undocumented, but as this Court has previously found, it "procedes from the somewhat cynical assumption that the networks themselves will cut back on this type of programming..." due to the access rule. Mt. Mansfield Television, Inc. v. F.C.C., supra, 442 F. 2d at 479. The simple truth is that the original access rule left ample opportunity for the network presentation of the material the Commission now seeks to exempt. **/

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*/ Winters v. People of State of New York, 333 U.S. 507, 510 (1948).

**/ Indeed, the Commission has recently instituted an inquiry to examine the reasons for the high incidence of repeat programming("reruns") in network prime time. It appears that the networks now do not have sufficient original program material to program the hours they now occupy. See In re Use of "Rerun Material in Prime Time on Network-Owned or Affiliated Television Stations in Regular Network Program Series, 48 FCC 2d 1232 (1974).

Children's programs were exempted because the Commission believed the rule impaired their availability "at the most appropriate time." (Second Report and Order, ¶46 (J.A.108)). The Commission's concern with children's programs is commendable, but again, does not justify the action taken. Quite overlooked in the Commission's explanation is the fact that under the original rule, stations were free to carry network children's programs at any time, including the early evening 7-8 p.m. period. No regulatory restraint barred early carriage, only the networks' unwillingness to give its affiliates the choice of carrying a children's program at 7:30 p.m. instead of a mystery at 10:30 p.m. */

Nor can the Commission's professed concern to avoid the need for waivers for individual programs or program series justify the broad exemptions which it has promulgated. While we share the Commission's desire to end its ill-conceived waiver program, the solution lies with the elimination of all exceptions based on alleged meritorious program content,

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*/ The Commission dismissed the specific suggestion that network affiliates were free to carry network children's programs at 7:30 p.m. and to stay within the 3 hour limitation by not carrying network programming at 10:30 p.m., because it was concerned "that such a trade-off might have the effect of discouraging the early scheduling of children's programming." Second Report and Order, ¶40, fn. 32 (J.A.106). Surely, a more reasoned analysis than this was required.

not with the codification of an unlawful ad hoc policy into general exemptions. */

The argument that the exemptions are permissive in nature and only intended to "relax a restraint" (Second Report and Order, ¶46, J.A. 108) is both specious and misleading. While "permissive" in the limited sense that the licensee is not directly commanded to carry the favored types of programs, the fact remains that the requirement effectively shapes and limits available program choices. Alternatives are drastically reduced. And, most importantly, the coercion and restraint is not born out of a desire to further First Amendment objectives in broadcasting, but intended only to encourage program content thought desirable by the Commission. **/

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*/ The United States Court of Appeals for the District of Columbia Circuit currently has under review the propriety of one of these waiver actions. N.A.I.T.P.D. v. F.C.C., Case No. 73-2052, argued October 17, 1974. Group W is an intervenor in that appeal, challenging the legality of the Commission's action, 43 FCC 2d 462 waiving the access rule to permit presentation of the off-network program series "America" without regard to the 3 hour limitation.

**/ Moreover, the impact of the exemption is substantial and may not be dismissed as de minimus. Based on currently announced network plans for the Fall 1975 season, our best estimate is that at least 25% of the 8 1/2 hour periods actually cleared of network programs by the access rule (see Network Television Broadcasting, supra, 23 FCC 2d at 395) will be recaptured by the three networks through the use of exempted programs. Nor may they be dismissed on the theory that the affiliated station has the option of not carrying any particular network program. Given the exceptionally high degree of acceptance of network programs by affiliates (J.A. 97) and network programming practices which make the non-clearance of a particular program difficult, this is an illusory argument.

"But, above all else, the First Amendment means that government has no power to restrict expression because of its message, its ideas, its subject matter, or its content." Police Department of the City of Chicago v. Mosley, 408 U.S. 92, 95 (1972). Given the inherent limitations on available broadcast time, favoring certain types of programs because of their alleged meritorious content is no different than restricting other less favored categories.

Moreover, First Amendment restraints need not always operate directly to be impermissible. Indirect action can have as "chilling" an effect (and perhaps be more insidious) than a frontal assault on First Amendment liberties. Cf. Bantam Books, Inc. v. Sullivan, 372 U.S. 58 (1963) (A state regulatory program which "simply exhorts booksellers and advises them of their legal rights" found to violate First Amendment liberties).

This was recognized by several of the public groups which participated in the proceeding as a result of this Court's suggestion. For example, the American Civil Liberties Union warned that the Commission's practice of granting waivers of the rule

> "necessarily involves the Commission in decision making on the basis of program content and its own judgment of the relative quality of particular network programs. This is an improper exercise of governmental power in the sensitive First Amendment area." Reply Comments of the American Civil Liberties Union, page 2.

And the comments of the Raza Association of Spanish Surnamed Americans voiced similar concern:

> "We oppose the FCC's practice of entertaining requests for and granting waivers to the present rule. This necessarily involves the FCC in decision making on the basis of program content, a dangerous exercise of governmental power in the always sensitive First Amendment area. In addition, the granting of waivers produces an effect contrary to the intent of the prime time access rule, since waivers favor off network programming and reduce opportunities for new and diverse sources of programming." Comments of Raza Assocation of Spanish Surnamed Americans, pages 6-7.

No matter how the Commission attempts to characterize the exemptions, the simple fact remains that the Commission is endeavoring to shape and directly influence the content of programs viewed by the American public in prime time. This unprecedented action exceeds the outer bounds of Red Lion and Mt. Mansfield. */ While its motives may be well intentioned, we submit that such programs should be secured by responsible licensees and an aroused and concerned viewing audience, not by government fiat.

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*/ As Mr. Justice Stewart has noted, "we there decided [Red Lion] that broadcasters' First Amendment Rights were 'abridgeable.' But surely this does not mean that those rights are nonexistent." CBS, Inc. v. Democratic National Committee, supra, 93 S.Ct. at 2108 (concurring opinion).

II. The New Exceptions to the Rule Constitute Censorship and Contravene the Statutory Scheme of the Communications Act.

The Commission is not without power to inquire into the types of programs broadcast by its licensees. It is well established that the Commission may interest itself "...in general program format and the kinds of programs broadcast by licensees." Red Lion Broadcasting Co. v. F.C.C., supra, at 395, citing National Broadcasting Co. v. United States, supra. But the exemptions now under review go far beyond established bounds and are in excess of the Commission's powers under the Communications Act.

The Communications Act directs the Commission to grant or withhold licenses as required by the "public interest, convenience or necessity." 47 U.S.C. §307(a); and §309. "An important element of the public interest and convenience affecting the issue of a license is the ability of the licensee to render the best practicable service to the community reached by his broadcast." F.C.C. v. Sanders Bros. Radio Station, 309 U.S. 470,475 (1940). Thus, while the selection of program material for broadcast is the responsibility of the licensee and not the Commission, the Commission traditionally has examined an applicant's program proposal as part of its overall determination as to whether a license

should be issued. */

It is equally well established that "...Congress did not want the Federal Communications Commission to become a censoring agency." Mt. Mansfield Television, Inc. v. F.C.C., supra, 442 F. 2d at 480. The Communications Act specifically bars the Commission from exercising "the power of censorship over the radio communications or signals transmitted by any radio station" and commands that "... no regulation or condition shall be promulgated...which shall interfere with the right of free speech by means of radio communication." 47 U.S.C. §326.

In effect,

> "...the Commission walks a tightrope between saying too much and saying too little. In most areas it has resolved this dilemma by imposing only general affirmative duties - e.g. to strike a balance between the various interests of the community....Given its long-established authority to consider program content, this general approach probably minimizes the danger of censorship or pervasive supervision." Banzaf v. F.C.C, supra, 405 F. 2d at 1095. See also, CBS, Inc. v. Democratic National Committee, supra, 93 S.Ct. at 2094-95.

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*/ The ability of the Commission to inquire into programming related matters in furtherance of its licensing responsibilities received judicial approval as early as 1930 in Great Lakes Broadcasting Co. v. Federal Radio Commission, 37 F. 2d 993 (D.C. Cir. 1930). It has been consistently affirmed since that time, including Justice Frankfurter's legendary statement in National Broadcasting Co. v. United States, supra, that "...the act does not restrict the Commission merely to supervision of traffic. It puts upon the Commission the burden of determining the composition of that traffic." 319 U.S. at 215-16.

No better recognition of this principle can be found than in the Commission's often-cited 1960 Report and Statement of Policy re: Commission En Banc Programming Inquiry, supra. Noting proposals before it at that time "...to require licensees to present specific types of programs on the theory that such action would enhance freedom of expression rather than tend to abridge it," the Commission was "... constrained to point out that the First Amendment forbids governmental interference asserted in aid of free speech, as well as governmental action repressive of it. The protection against abridgement of freedom of speech and press flatly forbids governmental interference, benign or otherwise." */

Thus, responsibility for the selection of types of programs to be broadcast and determinations of program content were left to individual broadcasters subject only to review by the Commission within the broad context of its statutory licensing powers to act on the basis of the public interest:

> "...responsibility for the selection and presentation of broadcast material ultimately devolves upon the individual station licensee, and the fulfillment of the public interest requires the free exercise of his independent judgment. Accordingly, the Communications Act 'does not essay to regulate the business of the licensee. The

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*/ 20 P & F Radio Reg. at 1907. In this vein, the Commission cited with approval the statement of the President-elect of the American Bar Association in the proceeding that "...the Commission may not impose upon...[its licensees] its private notions of what the public ought to hear." Id.

> Commission is given no supervisory control of the programs...'
> ....
> "The Commission's role as a practical matter, let alone a legal matter, cannot be one of program dictation or program supervision." */

The Commission has, in effect, renounced this prudent policy and assumed a totally new role in promulgating the program exceptions now under review. This is not a situation in which the Commission has sought to withhold a license because of an inability to find that an applicant's overall program proposal would serve the public interest, convenience or necessity. Nor is it a situation in which the Commission has carefully reviewed a licensee's record of program service and found it to be seriously wanting.

Rather, the Commission has made an independent judgment that certain types of programs, because of their content, are sufficiently meritorious to warrant exception from an important regulatory program. It has, in effect, become the direct arbiter of what types of programs are most suitable for viewing by the American public. **/

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*/ Id. at 1908, citing F.C.C. v. Sanders Bros. Radio Station, supra, 309 US at 475.

**/ The inherent undesirability of this new role is illustrated by the fact that the Commission has no idea whatsoever as to what individual licensees would otherwise broadcast in absence of the exemption or what program service is thereby displaced. The Commission is not judging a licensee's overall program service but rather evaluating the merit of individual program types based on their content.

How deeply the Commission has become involved in individual program decisions is evident from its Order. Documentary programs merit special consideration because of their "obvious informational value" so long as the information is not conveyed in the form of a contest among participants. */ Programming for children is encouraged provided that it is not off-network material broadcast on a stripped (e.g., regularly throughout the week) basis. And the incursion of exempted program material into access time periods is permissible except on Saturday night.

In originally adopting the access rule, it was not the Commission's intention to "...promote the production of any particular type of program..." Network Television Broadcasting, supra, 23 FCC 2d at 397. The absence of any motive to encourage particular types of programs was the basis, in part, for this Court's finding that the adoption of the access rule did not exceed the Commission's statutory powers or constitute censorship. Mt. Mansfield Television, Inc. v. F.C.C., supra, 442 F. 2d at 480. This is not true with respect to the exemptions now under review.

Section 326 of the Communications Act directs that no condition shall be fixed by the Commission which shall interfere with the right of free speech. Yet, this is precisely what the Commission has done in exempting its

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*/ Thus, a traditional program such as John Kieran's "Information Please," which was long popular on radio and television, would apparently not be favored by the Commission.

licensees from the operation of an otherwise valid regulatory program on condition that particular types of programs be broadcast.

Not only do the exemptions exceed the Commission's statutory powers, but they are unnecessary. The Commission has ample authority, without recourse to the challenged exemptions, to effectuate valid regulatory programs such as those dealing with television programming for children. */

Indeed, these policies are now being effectuated through the Commission's licensing procedures, the means by which it has traditionally approached sensitive questions involving judgments as to program content. For example, the Commission has recently amended its license renewal application forms to request specific information with respect to an applicant's policies concerning television programming for children. **/ Similarly, with respect to public affairs programming, the Commission has recently acted to require the reporting of more explicit information concerning an applicant's practices and has adopted an annual reporting system to permit a more

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*/ This is not a situation in which the Commission's action is necessary and appropriate because it is "...only reasonably incidential to the achievement of another valid governmental purpose." New Jersey State Lottery Commission v. U.S., 491 F. 2d 219, 222 (3d Cir.), cert. granted, 94 S.Ct. 2603 (1974).

**/ TV License Renewal Form Amended on Children's Programming, Report No. 10279, January 27, 1975.

careful examination of the manner in which each station's policies are being effectuated. */

Through the careful exercise of its licensing powers, the Commission should be able to insure the success of its programs without violating the prohibition against the imposition of a condition based on program content as it has done here.

III. The Definitions of Exempted Program Categories are Impermissibly Vague and Violate the First Amendment.

Regulatory schemes which involve judgments as to the content of material entitled to First Amendment protection touch upon a very delicate area. **/ It is for this reason that "[p]recision of regulation must be the touchstone..." NAACP v. Button, 371 U.S. 415 (1963). Otherwise valid regulatory plans involving restraints on the freedom of expression have been struck down solely because of "...the absence of narrowly

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*/ In re Formulation of Rules and Policies relating to the Renewal of Broadcast Licenses, 43 FCC 2d 1 (1973).

**/ The Communications Act subjects persons who violate "...any rule, regulation, restriction, or condition made or imposed by the Commission..." to penalties, criminal and otherwise. See 47 U.S.C. §502. Other sanctions are also available to the Commission including a civil forfeiture (see 47 U.S.C. §503) or revocation of license (see 47 U.S.C. §312(a)). Thus, a licensee who chooses to exceed the three-hour network limitation risks possible serious penalties should its judgment as to what constitutes an exempt program not be correct.

drawn, reasonable and definite standards for the officials to follow." Niemotko v. Maryland, 340 U.S. 268(1951). See also, Kingsley Int'l Pictures Corp. v. Regents, 360 U.S. 684 (1959); Teitel Film Corp. v. Cusack, 390 U.S. 139 (1968); Winters v. People of the State of New York, supra; Rabeck v. New York, 391 U.S. 462 (1968); and Saia v. People of the State of New York, 334 U.S. 558 (1948). And, as the Supreme Court has stated in striking down a classification system for motion pictures for want of reasonably precise, definite standards, "vagueness and...[its] attendant evils...are not rendered less objectionable because the regulation of expression is one of classification rather than direct suppression." Interstate Circuit, Inc. v. City of Dallas, 390 U.S. 676 (1968), citing Bantam Books Inc. v. Sullivan, supra.

The Commission's newly promulgated exemptions present this Court with a program classification system impermissibly vague, arbitrary and indefinite on its face. How is a licensee to interpret, for example, what constitutes a "program designed for children aged 2 through 12"? Apart from this definition, the only guidance provided by the Commission is its injunction against the use of this exception for the presentation of programming "which while having some appeal to children, were or are not primarily designed for them but for viewing by adults, or adults and children and for the presentation of normal commercial advertising addressed to adults." Second Report and Order, ¶31 (J.A. 101).

It is true that the Commission's reference to NBC's Disney program as falling within this exemption (Id. at fn. 25) could be interpreted as providing further guidance. But even this isolated reference is more confusing than helpful. In its order before you last year, the Commission sought to remove Sunday evening from the operation of the access rule because it was "traditionally a popular family entertainment network period," citing the Disney program as an example. */ From this, one would suspect Disney is a program intended for family viewing **/ which, according to the Commission's present Order, would not qualify for the exemption. But, this year we find quite the opposite is true. If the Commission is unable to fashion a reasonable and consistent idea of what constitutes a children's program, how does it expect its licensees to do better?

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*/ See Prime Time Access Rule, supra, 44 FCC 2d at 1132; and Brief of Respondent Federal Communications Commission, National Association of Independent Television Producers and Distributors v. F.C.C., p. 22.

**/ This is confirmed by the Nielson National TV Rating Report for January 13-26, 1975 (excerpts attached as Appendix B) which classifies Disney as FV (Format Varies) rather than CE (Child Evening) and indicates that the program has a predominantly adult audience. Furthermore, program logs for the 1974 composite week which are required to be available for public inspection (see 47 C.F.R. §1.526(a)(8)) indicate that the program contains advertising for such companies as Western Union, B.F. Goodrich and Singer, all of which would appear to be primarily for adults.

Similar problems are presented with respect to the other excluded program categories. The definition of a documentary program (non-fictional and educational or informational) is sufficiently broad to encompass almost any non-ficticious television program. Depending on a person's views, virtually every program on television could be categorized as "educational or information. */ While the exclusion of certain types of documentary programs involving contests among participants and those relating to the visual entertainment arts is somewhat limiting, it does not cure the problem for this exception is vague in and of itself. A licensee has no way of knowing, for example, whether a program like "Information Please" is a disfavored game show or a more acceptable program of obvious informational value.

The exclusion for public affairs programs is not further defined by the Commission in the amended regulation or the Commission's Order. The only recourse available to licensees is the definition of a public affairs program found in a note to Section 73.670 (47 C.F.R. §73.670) of the Commission's regulations which reads as follows:

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*/ Section 73.670 of the Commission's rules (47 C.F.R. §73.670) governing the maintenance of station program logs does include the program classifications of "instructional programs" and "educational institution programs". However, this provides no guidance as neither revised Section 76.658(k)(1) nor the Commission's Order refers to these definitions. It is impossible to determine whether the Commission intended its licensees to look to this regulation in determining whether a documentary program is informational or educational in nature. The term "documentary program" is not defined in the Commission's regulations.

> "(d) Public Affairs Programs (PA) include talks, commentaries, discussions, speeches, editorials, political programs, documentaries, forums, panels, round tables, and similar programs primarily concerning local, national and international affairs."

This definition may be helpful, but again it is not precise and tends to add more confusion. For example, why were documentary programs the subject of a specific exclusion if the definition of a public affairs program includes documentaries? Similarly, why were political broadcasts by or on behalf of legally qualified candidates for public office subject to a specific exclusion (Section 73.658(k)(2)) if the definition of a public affairs program includes political programs?

Given these broad, indefinite and overlapping definitions, the only safe way for a licensee to avoid serious trouble would be to seek an advisory ruling from the Commission before airing each episode of a program thought to fall within one of the exempt program categories. Conceivably, it would be possible for the Commission to review and scrutinize each program episode and rule on its acceptability in advance. Alternatively, it has been suggested that the Commission could establish some sort of a surveillance system to police the exceptions. The Chief of the Commission's Office of Network Study was quoted only recently as saying "...that the FCC would be monitoring stations for abuses of PTAR III and, that the Commission would not permit anything so blatant

as the stripping of old Lassies." Broadcasting, February 17, 1975, page 30.

But if procedures such as this would not involve the Commission in the examination of program content and government censorship prohibited by the First Amendment and the Communications Act, we are at a loss to determine the bounds of the Commission's power in this sensitive area.

CONCLUSION

For the foregoing reasons, this Court should declare unlawful and set aside the Order amending Section 73.658(k) of the Commission's Rules and Regulations to include Section 73.658 (k)(1).

Respectfully submitted,

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February 21, 1975

APPENDIX A

Effective September 8, 1975, §73.658(k) of the Commission's Rules, the prime time access rule, is amended to read as follows:

§73.658 Affiliation agreements and network program practices.

* * * * *

(k) Effective September 8, 1975, television stations owned by or affiliated with a national television network in the 50 largest television markets (see NOTE 1 to this paragraph) shall devote, during the four hours of prime time (7-11 p.m. E.T. and P.T., 6-10 p.m. C.T. and M.T.), no more than three hours to the presentation of programs from a national network, programs formerly on a national network (off-network programs) or feature films which have previously appeared on a network: provided, however, That the following categories of programs need not be counted toward the three-hour limitation:

(1) Network or off-network programs designed for children, public affairs programs or documentary programs (see NOTE 2 to this paragraph for definitions).

(2) Special news programs dealing with fast-breaking news events, on-the-spot coverage of news events or other material related to such coverage, and political broadcasts by or on behalf of legally qualified candidates for public office.

(3) Regular network news broadcasts up to a half hour, when immediately adjacent to a full hour of continuous locally produced news or locally produced public affairs programming.

(4) Runovers of live network broadcasts of sporting events, where the event has been reasonably scheduled to conclude before prime time or occupy only a certain amount of prime time, but the event has gone beyond its expected duration due to circumstances not reasonably foreseeable by the networks or under their control. This exemption does not apply to post-game material.

(5) In the case of stations in the Mountain and Pacific time zones, on evenings when network prime-time programming consists of a sports event or other program broadcast live and simultaneously throughout the contiguous 48 states, such stations may assume that the network's schedule that evening occupies no more of prime time in these time zones than it does in the Eastern and Central time zones.

(6) Network broadcasts of an international sports event (such as the Olympic Games), New Year's Day college football games, or any other network programming of a special nature other than motion pictures or other sports events, when the network devotes all of its time on the same evening to the same programming, except brief incidental fill material.

NOTE 1. The top 50 markets to which this paragraph applies on the 50 largest markets in terms of prime time audience for all stations in the market, as listed each year in the Arbitron publication Television Market Analysis. This publication is currently issued each November, and shortly thereafter the Commission will issue a list of markets to which the rule will apply for the year starting the following September.

NOTE 2. As used in this paragraph, the term "programs designed for children" means programs primarily designed for children aged 2 through 12. The term "documentary programs" means programs which are non-fictional and educational or informational, but not including programs where the information is used as part of a contest among participants in the program, and not including programs relating to the visual entertainment arts (stage, motion pictures or television) where more than 50% of the program is devoted to the presentation of entertainment material itself.

APPENDIX B

NIELSEN NATIONAL TV RATINGS

INCLUDING AUDIENCE COMPOSITION

2ND JANUARY 1975 REPORT
(Two Weeks Ending Jan. 26, 1975)

NIELSEN TELEVISION INDEX

When a regular program is pre-empted, the station count reported for the week following its pre-emption includes delayed telecasts of earlier episodes which were telecast during the week the program was pre-empted. Station line-up information is as received from the networks by Nielsen at the time of report production.

7. **PROGRAM COVERAGE:** Number of TV households that can receive the program over one or more of the station facilities used — in percent of U.S. TV households. This figure is reported in the PROGRAM AUDIENCE ESTIMATES (ALPHA) table for each week of the current report.

8. **VIEWING HOUSEHOLDS:** Projected NIELSEN AVERAGE AUDIENCE (see Definition 2).

9. **VIEWERS PER 1000 VIEWING HOUSEHOLDS:** Reported on an average-minute basis for selected persons categories. Visitors are included. Children under 2 are excluded.

Viewers per 1000 Viewing Households are reported as an optional feature during certain ratings report intervals.

10. **HOUSEHOLD & PERSONS RATING** (by half-hour time segments): Program ratings reported as 2-week averages in the PROGRAM AUDIENCE ESTIMATES (BY TIME PERIODS) table for selected persons categories as a percentage of total persons (of each reported category) in TV households.

This Table is an optional feature during certain report periods.

11. **NUMBER OF U.S. TV HOUSEHOLDS:** As of September 1, 1974, the number of U.S. TV households (excluding Alaska and Hawaii) is estimated at 68,500,000, approximately 97.1% of all U.S. households.

12. **NUMBER OF PERSONS IN U.S. TV HOUSEHOLDS:** Nielsen's estimates as of September 1, 1974.

13. **PROGRAM TYPES:**

A-Adventure
AC-Award Ceremonies and Pageants
AP-Audience Participation
C-Child Multi-Weekly
CA-Child Day-Animation
CC-Conversations, Colloquies
CE-Child Evening
CL-Child Day-Live
CM-Concert Music
CS-Situation Comedy
CV-Comedy Variety
D-Devotional
DD-Daytime Drama
DG-Documentary, News
DN-Documentary, News
EA-Evening Animation
EW-Western Drama
FF-Feature Film
FV-Format Varies
GD-General Drama
GV-General Variety
IA-Instructions, Advice
MD-Musical Drama
N-News
OP-Official Police
P-Political
PC-Popular Music-Contemporary
PD-Private Detective
PS-Popular Music-Standard
QZ-Quiz-Give Away
QP-Panel
SC-Sports Commentary
SE-Sports Event
SF-Science Fiction
SM-Suspense/Mystery other than OP, PD
U-Unclassified

The Program Type Comparisons ratings averages combine certain types, as follows:

Suspense & Mystery Drama (OP, PD, SM)
Variety (CV, GV)
Quiz & Audience Participation (AP, QG, QP)
Children's (CA, CL)
Informational (CC, DG, DN, IA, N)

14. **PROGRAM LINEUPS:**

NTI audience estimates are based upon station lineups as supplied by the networks or as received directly from their affiliates.

Station changes received after the established deadlines are processed using procedures developed by Nielsen to appraise the effect of late information on published rating estimates.

For additional information, see Section IV, B of the NTI/NAC Reference Supplement.

PROGRAM AUDIENCE ESTIMATES (Alphabetic)

2nd JAN. 1975 REPORT (Jan. 13-26)

PROGRAM NAME / WK / DAY / START TIME / DUR / NET / NO OF T/C THIS SEASON / PROG TYPE	NO. STATIONS & PROG. COVG. WK 1	WK 2	KEY	HOUSEHOLD AUDIENCES AVG. AUD %	SHARE %	AVG. AUD (0,000)	AUDIENCE COMPOSITION — VIEWERS PER 1000 VIEWING HOUSEHOLDS BY SPECIFIED CATEGORIES: TOTAL PERSONS **	LADY OF HOUSE	WORKING WOMEN	WOMEN (BY AGE): TOTAL	18-34	18-49	25-54	35-54	55+	MEN (BY AGE): TOTAL	18-34	18-49	25-54	35-54	55+	TEENS (12-17): TOTAL	FEMALE	CHILDREN (2-11): TOTAL	6-11
EVENING (cont'd)																									
TONIGHT SHOW	79	213 215	A	10.8	39	740	1523	732	209	785	252	423	396	233	300	588	219	363	326	191	178	114	42+	36+	27+
MON. 12.00M 75 NBC GV	99	99	B	10.1	36	692	1457	718	224	781	268	441	410	239	274	545	210	329	299	165	170	95	40	36	26
T-F 11.30P 75																									
1ST HALF-HOUR			A	12.7	39	870	1545	739	218	798	260	439	407	238	300	601	220	363	330	191	190	109	45+	37+	29+
2ND HALF-HOUR			A	10.3	39	706	1501	726	194	778	249	407	383	224	305	576	220	363	321	186	170	116	41+	31+	25+
TONY ORLANDO AND DAWN	6	194 198	A	20.6	31	1411	2214	767	300	855	350	538	447	256	251	613	213	354	348	199	201	268	182	478	336
WED. 8.00P 60 CBS GV	98	99	B	19.5	29	1336	2175	798	320	867	328	526	463	272	267	600	198	339	328	189	213	284	177	424	302
1ST HALF-HOUR			A	16.6	28	1274	2233	770	303	873	371	552	445	248	254	609	210	348	348	194	205	251	179	500	343
2ND HALF-HOUR			A	22.6	33	1548	2200	763	298	840	337	532	453	261	242	616	211	356	348	205	200	287	183	457	330
TUE. MOVIE OF THE WEEK	16	186 190	A	18.0	26	1233	2007	720	247	807	355	534	494	247	205	616	255	474	425	253	108	293	115	291	230
TUE. 8.30P 90 ABC FF	98	98	B	18.3	28	1254	1998	722	253	786	370	550	472	236	180	594	260	434	364	218	116	269	136	349	269
1ST HALF-HOUR			A	16.8	24	1151	2036	713	213	775	327	504	487	247	201	598	242	470	415	248	108	303	117	360	270
2ND HALF-HOUR			A	18.4	27	1260	2002	713	258	808	364	538	494	244	200	630	260	434	436	258	112	294	115	270	220
3RD HALF-HOUR			A	18.8	29	1288	1983	729	264	835	371	552	500	248	216	615	258	462	423	250	107	288	117	245	206
WALTONS, THE	19	208 209	A	27.8	42	1904	1991	792	252	858	275	448	393	241	342	525	165	282	263	171	189	202	124	406	278
THU. 8.00P 60 CBS GD	99	99	B	26.7	42	1829	2023	801	245	990	311	485	419	249	320	522	174	285	267	162	186	207	116	414	267
1ST HALF-HOUR			A	27.1	41	1856	1993	794	261	859	269	445	396	245	345	522	163	275	255	164	195	204	122	408	279
2ND HALF-HOUR			A	28.6	43	1959	1982	788	241	853	282	452	391	236	335	529	170	291	270	175	184	198	123	402	277
WED. MOVIE OF THE WEEK	17	189 184	A	16.8	27	1151	1911	657	233	695	326	487	432	220	149	669	288	497	457	241	140	265	106	282	202
1 WED. 8.30P 90 ABC FF	98	97	B	19.3	30	1322	1959	710	247	770	355	539	471	247	168	627	282	457	408	224	121	251	110	311	237
2 WED. 9.30P 90																									
1ST HALF-HOUR			A	14.6	22	1000	1961	655	239	704	313	476	443	234	157	665	288	494	465	247	130	236	97+	356	249
2ND HALF-HOUR			A	18.0	29	1233	1892	666	232	698	337	498	433	215	146	664	280	484	441	232	152	266	116	264	189
3RD HALF-HOUR			A	17.8	29	1219	1884	656	225	690	332	488	418	211	147	684	303	514	469	243	138	279	100	231	173
WEEKEND TONIGHT SHOW	8	102	A	6.3	25	432	1565	917	294+	917	367+	550	474+	276	274+	586	183+	327	262+	180	223+	62+	51+	LT	LT
1 SUN. 11.30P 75 NBC GV		78	B	5.0	20	343	1540	726	183	763	310	456	379	199	254	619	214	360	350	200	205	131	37	27	27
1ST HALF-HOUR			A	7.2	24	493	1594	894	257+	894	331+	507	476+	276	287+	628	201+	365	301+	193	234+	72+	50+	LT	LT
2ND HALF-HOUR			A	6.2	26	425	1565	748	317+	991	429+	645	485+	299	263+	516	178+	260	201+	126	212+	58+	56+	LT	LT
WEEKEND NEWS MAGAZINE(S)		156	A	6.7	26	459	1434	612	107+	644	261+	418	392+	203	180+	618	231+	366	392+	161	226+	162+	LT	LT	LT
2 SUN. 11.30P 75 NBC DN		92																							
1ST HALF-HOUR			A	8.0	26	548	1474	640	119+	665	278+	450	423+	209	178+	662	221+	416	450	229	212+	130+	LT	17+	17+
2ND HALF-HOUR			A	6.1	25	418	1404	562+	87+	610	246+	389	360+	190	174+	593	238+	327	359+	121	234+	201+	LT	LT	LT
WIDE WORLD MYSTERY	20	157 152	A	5.2	18	356	1483	721	208	737	270	487	443	273	194	519	216	348	290	164	139+	97+	27+	130+	112+
1 MON. 11.55P 60 ABC FV	95	91	B	5.1	18	349	1435	657	193	703	299	484	435	245	159	515	233	372	323	185	97	121	49	96	81
1 TUE. 11.30P 60																									
2 TUE. 11.50P 60																									
2 FRI. 11.30P 60																									
1ST HALF-HOUR			A	6.7	19	459	1478	709	235	740	307	503	465	269	164	618	279	354	349	201	138	96+	39+	224	203
2ND HALF-HOUR			A	5.2	19	356	1407	694	194	700	245	467	431	273	182	486	194	326	276	155	137+	100+	27+	121+	104+
3RD HALF-HOUR			A	3.5	17	240	1221	766	146+	766	246	467	404	266	254	379	62+	224	224+	162	155+	76+	LT	LT	LT
WIDE WORLD SPECIALS	29	158 157	A	4.9	17	336	1482	709	267	768	296	479	413	221	251	568	169+	298	281	159	240	95+	51+	51+	37+
W & TH 11.30P 60 ABC FV	95	94	B	4.7	17	322	1431	719	251	757	321	504	450	238	198	533	246	372	321	169	118	94	53	47	28
1ST HALF-HOUR			A	5.4	17	370	1492	693	246	749	306	459	398	195	248	559	137+	263	264	160	262	105+	59+	79+	55+
2ND HALF-HOUR			A	4.4	17	303	1472	732	293	792	285	502	436	254	253	581	211	341	296	154	216	76+	36+	23+	17+
WONDERFUL WORLD OF DISNEY	18	220 220	A	22.0	33	1507	2294	734	238	792	220	415	394	273	299	732	200	418	401	277	255	229	99	541	339
SUN. 7.30P 60 NBC FV	99	99	B	24.0	38	1644	2236	720	233	789	266	438	400	239	284	725	228	416	404	248	249	202	81	520	324
1ST HALF-HOUR			A	21.5	33	1473	2212	706	225	768	234	388	370	259	305	710	186	394	376	261	263	217	93	517	322
2ND HALF-HOUR			A	22.5	34	1541	2380	760	250	817	238	448	423	288	291	759	214	443	430	300	245	240	105	564	357

KEY: A=CURRENT REPORT B=SEASON AVERAGE

FOOTNOTES: FOR EXPLANATION OF SYMBOLS, SEE LAST PAGE.

75-4021

IN THE

United States Court of Appeals

FOR THE SECOND CIRCUIT

NATIONAL ASSOCIATION OF INDEPENDENT TELEVISION PRODUCERS AND DISTRIBUTORS	)	
WARNER BROTHERS, INC., COLUMBIA PICTURES INDUSTRIES, INC., MGM TELEVISION, UNITED ARTISTS CORPORATION, MCA, INC. and TWENTIETH CENTURY-FOX TELEVISION	)	Nos: 75-4021 75-4024 75-4025 75-4026
SANDY FRANK PROGRAM SALES, INC.	)	
WESTINGHOUSE BROADCASTING COMPANY, INC.	)	
CBS, INC., *Petitioners,*	)	
v.	)	
FEDERAL COMMUNICATIONS COMMISSION and THE UNITED STATES OF AMERICA, *Respondents,*	)	
AMERICAN BROADCASTING COMPANIES, INC. *et al.* *Intervenors.*	)	

CERTIFICATE OF SERVICE

I do hereby certify that 2 copies of the "Brief of Petitioner Westinghouse Broadcasting Company, Inc." have been served by United States mail, first class, postage prepaid (or by hand if so requested) this 21st day of February 1975 upon the following:

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